

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 25, 2017**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2016AP272**

**Cir. Ct. No. 2010CV14625**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STEVEN R. SCHMIDT,**

**PLAINTIFF-APPELLANT,**

**UNITED HEALTHCARE INSURANCE COMPANY,**

**INTERVENOR,**

**V.**

**GORAN DRAGISIC, NICOLE L. DRAGISIC AND BADGER MUTUAL  
INSURANCE COMPANY,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Milwaukee County:  
DENNIS P. MORONEY, Judge. *Affirmed.*

Before Brennan, P.J., Brash and Dugan, JJ.

**Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

¶1 PER CURIAM. Steven R. Schmidt, *pro se*, appeals an order that dismissed his personal injury suit for failure to prosecute. Additionally, respondent Badger Mutual Insurance Company moves the court to declare Schmidt's appeal frivolous. We affirm the order but deny the motion.

### **BACKGROUND**

¶2 Schmidt, represented by counsel, filed a complaint in August 2010 alleging he sustained injuries in a 2007 car accident when his vehicle was hit from behind by an uninsured driver, Goran Dragisic. Schmidt named Dragisic and his wife as respondents, and Schmidt also included an uninsured motorist claim against his own insurer, Badger Mutual. In December 2012, the circuit court ruled on a variety of motions and set the matter for trial in April 2013. Schmidt filed a notice of appeal *pro se* a few days later seeking to challenge the circuit court's interim rulings.

¶3 In February 2013, we dismissed Schmidt's *pro se* appeal without prejudice, explaining that we lacked jurisdiction to entertain an appeal from a nonfinal order. See *Schmidt v. Dragisic (Schmidt I)*, No. 2012AP2778, unpublished op. and order (WI App Feb. 12, 2013). The following month, Schmidt's trial counsel withdrew, citing fundamental disagreements with Schmidt about how to proceed. The circuit court took the case off the trial calendar to permit Schmidt an opportunity to find new counsel.

¶4 Schmidt appeared *pro se* for a status conference in April 2013 and advised he was attempting to remove his case to federal court. In May 2013,

Schmidt again appeared *pro se*. He said he did not plan to obtain counsel until “after the federal court rules on this case,” and he opposed setting the matter for trial. The circuit court observed that, notwithstanding Schmidt’s ongoing efforts to proceed in federal court, Wisconsin retained jurisdiction of the matter. Over Schmidt’s objection, the circuit court scheduled the case for a multi-day jury trial starting on February 10, 2014.

¶5 On the trial date, Schmidt filed a document titled, in part, “Plaintiff’s Pre-Jury Trial Complaint” requesting, *inter alia*, “an extension of time [to] ... acquire a new attorney.” At the outset of the proceedings, Schmidt advised the circuit court that he had filed a federal bankruptcy action. Concerned about the effect of the federal action on the Wisconsin proceedings, the circuit court cancelled the trial and set the matter for a status hearing on March 3, 2014, directing Schmidt to provide information by that date as to whether the bankruptcy trustee would be prosecuting his circuit court claims. Schmidt did not comply with the directive. Instead, he submitted a copy of a federal court pleading seeking to stay the state court proceeding and to transfer the matter to federal court.

¶6 Badger Mutual shouldered Schmidt’s burden and filed a report from the bankruptcy trustee, who advised that the trustee would not prosecute claims on Schmidt’s behalf in federal court. Badger Mutual also filed a copy of a bankruptcy court order denying Schmidt’s request that the federal court stay the state action. In light of the foregoing information about the scope and effect of the federal proceedings, the circuit court scheduled the Wisconsin case for a multi-day jury trial commencing on December 1, 2014.

¶7 The circuit court heard a variety of pretrial motions on July 31, 2014. Two weeks later, Schmidt filed his second *pro se* notice of appeal, stating that he sought to challenge an order that “dismissed [] Dragisic from all liability.” Based on Schmidt’s appellate filing, the circuit court took the case off the trial calendar.

¶8 In early February 2015, we dismissed Schmidt’s second *pro se* appeal. See *Schmidt v. Dragisic (Schmidt II)*, No. 2014AP1884, unpublished op. and order (WI App Feb. 2, 2015). Our decision explained that the circuit court had not dismissed a party, and we told Schmidt once again that we lacked jurisdiction over an appeal from a nonfinal ruling. Following our order disposing of *Schmidt II*, the circuit court held a status conference on May 1, 2015. At that time, the circuit court set the case for a three-and-one-half-day trial beginning on January 18, 2016.

¶9 The circuit court conducted a pretrial hearing on December 1, 2015, and resolved Badger Mutual’s motions *in limine*. Two weeks later, Schmidt filed his third *pro se* notice of appeal, stating in the notice that he would challenge the circuit court’s December 1, 2015 rulings limiting the evidence he could present. Shortly thereafter, Badger Mutual moved the circuit court to stay the trial. In support, Badger Mutual explained that it had asked this court for a declaration that Schmidt’s third effort to appeal nonfinal orders was frivolous and had requested sanctions that, if imposed, would affect Schmidt’s ability to try the case.

¶10 On January 12, 2016, the circuit court gave notice in writing that the courthouse would be closed on January 18, 2016, and the trial therefore would begin on January 19, 2016. The notice further provided that the circuit court would hear Badger Mutual’s motion for a stay before calling the case for trial.

¶11 By opinion and order dated January 15, 2016, we dismissed Schmidt’s third *pro se* appeal, reiterating that a notice of appeal from a nonfinal order does not confer jurisdiction on the court of appeals. *See Schmidt v. Dragisic (Schmidt III)*, No. 2015AP2664, unpublished op. and order (WI App Jan. 15, 2016). We declined to declare the appeal frivolous although we cautioned Schmidt about his appellate filings.

¶12 On January 19, 2016, Schmidt and Badger Mutual appeared before the circuit court. Badger Mutual withdrew its request for a stay in light of our decision in *Schmidt III*. The circuit court said it intended to try the case that day. Schmidt said he was not prepared for trial and had not subpoenaed his medical witnesses.

¶13 Badger Mutual’s attorney moved to dismiss the case for failure to prosecute. Schmidt opposed the motion, telling the circuit court he was unprepared “because this case was on appeal.... That put a stay on this case.” The circuit court responded that Schmidt had merely attempted to appeal, the matter had not been stayed, and the case had remained on the trial calendar and within the circuit court’s jurisdiction. Schmidt next suggested that the case should not proceed to trial because the various pretrial rulings in this matter adversely affected his contemplated presentation. The circuit court pointed out, however, that Schmidt was required to proceed to a final order on the merits, and if he was dissatisfied with the outcome, he could then appeal from that final order and seek a new trial based on any or all of the circuit court’s rulings that he believed were in error. Schmidt insisted to the circuit court that he “c[ould]n’t go through two different trials.... There’s no way we can do this twice.”

¶14 The circuit court found that it had set trial dates with ample notice to Schmidt, but he had “just ignored the [c]ourt” and taken actions based on misconceptions about “what happens to a case during an interlocutory appeal.” The circuit court further found that Schmidt had not prepared for trial but instead had engaged in a pattern of delay that prevented resolution of his claims. Accordingly, the circuit court granted the motion to dismiss for failure to prosecute. Schmidt appeals.

### DISCUSSION

¶15 The decision to dismiss an action as a sanction for failure to prosecute rests within the circuit court’s discretion. *See Monson v. Madison Family Inst.*, 162 Wis. 2d 212, 223, 470 N.W.2d 853 (1991). We will sustain a discretionary decision “if the circuit court has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.” *Schneller v. St. Mary’s Hosp. Med. Ctr.*, 162 Wis. 2d 296, 306, 470 N.W.2d 873 (1991). The circuit court’s factual findings are binding on this court “unless they are ‘clearly erroneous.’” *East Winds Props., LLC v. Jahnke*, 2009 WI App 125, ¶13, 320 Wis. 2d 797, 772 N.W.2d 738 (citations omitted). A circuit court’s sanction of dismissal is legally proper if the sanctioned party has acted egregiously or in bad faith. *See Industrial Roofing Servs. v. Marquardt*, 2007 WI 19, ¶43, 299 Wis. 2d 81, 726 N.W.2d 898. When the circuit court does not use the words “egregious” or “bad faith” in reaching its conclusions regarding the sanctioned party’s actions, we will nonetheless uphold a dismissal as a proper exercise of discretion if the circuit court made an implicit determination under the correct standard and if the facts provide a reasonable basis for the court’s implicit determination. *See Schneller*, 162 Wis. 2d at 311.

¶16 In this case, the circuit court did not use the words “egregious” or “bad faith” to describe Schmidt’s conduct, but the circuit court implicitly concluded that Schmidt’s actions were egregious. Conduct is egregious when it is “extreme, substantial and persistent.” *Teff v. Unity Health Plans Ins. Corp.*, 2003 WI App 115, ¶14, 265 Wis. 2d 703, 666 N.W.2d 38 (citation omitted). The circuit court observed here that the matter had been set for trial “a long long time ago” and found that Schmidt had ignored the scheduled trial dates. The circuit court further found that Schmidt’s failure to prepare for trial was part of a pattern in which he refused to recognize that litigants are normally required to continue in the circuit court from the inception of a case until it concludes and have the right to seek reversal of alleged circuit court errors only in an appeal from a final judgment or final order. *See* WIS. STAT. § 808.03(1) (2015-16);<sup>1</sup> *see also Cascade Mountain, Inc. v. Capitol Indem. Corp.*, 212 Wis. 2d 265, 268, 569 N.W.2d 45 (Ct. App. 1997). In the circuit court’s view, Schmidt deliberately obstructed the proceedings by refusing to recognize the circuit court’s jurisdiction, repeatedly filing appeals from nonfinal orders, “dragging this case out really unnecessarily,” and ultimately choosing to come to court on the trial date unprepared to proceed.

¶17 The record supports the circuit court’s findings. Schmidt made numerous requests for delays, sought to remove the case from the state court’s jurisdiction, and took last-minute actions that prevented the case from going forward. Moreover, Schmidt acknowledged that he had pursued multiple appeals from nonfinal orders to dodge the effect of the circuit court’s pretrial rulings. He ultimately elected to come to court unprepared on the trial date, explaining that in

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

his view, this would avoid the need for “two different trials” that he felt he could not afford. Because the circuit court’s findings are not clearly erroneous, we must defer to them. *See East Winds*, 320 Wis. 2d 797, ¶13.

¶18 “Dismissal is warranted only for egregious conduct without any clear and justifiable excuse.” *Selmer Co. v. Rinn*, 2010 WI App 106, ¶35, 328 Wis. 2d 263, 789 N.W.2d 621. The burden to show an excuse that is clear and justifiable rests with the party challenging dismissal. *See Prahl v. Brosamle*, 142 Wis. 2d 658, 666, 420 N.W.2d 372 (Ct. App. 1987). Although Schmidt’s arguments in this court are neither well articulated nor fully developed, we understand Schmidt to offer several reasons for his conduct in this case.

¶19 Schmidt indicates that he reasonably failed to prepare for trial because he did not receive a copy of our decision dismissing *Schmidt III* until the trial date, and therefore he did not know how our decision would affect his trial presentation. As the circuit court pointed out, however, we give notice of our opinions and orders on our publicly-accessible electronic docket, and the information that we had dismissed *Schmidt III* was thus available to Schmidt on the day we released our decision. Moreover, Wisconsin law expressly provides that in a civil proceeding such as this one, a notice of appeal does not affect the circuit court’s ability to proceed. *See* WIS. STAT. § 808.075(3). Rather, “the circuit court retains the power to act on all issues until the record has been transmitted to the court of appeals.” *Id.* In this case, the record remained with the circuit court through the date of trial. Accordingly, the status of Schmidt’s third attempt to pursue an appeal from a nonfinal order does not constitute a justifiable excuse for failing to prepare for trial.

¶20 Schmidt also suggests he reasonably chose not to prepare for trial because he believed the circuit court would grant a request for a stay. That contention is untenable. The circuit court’s power to control its own docket is essential to the court’s ability to function, *see Lentz v. Young*, 195 Wis. 2d 457, 465, 536 N.W.2d 451 (Ct. App. 1995), and the circuit court could properly decline to allow Schmidt to usurp control of the docket by forcing a stay based solely on Schmidt’s belief that a stay would be granted. Moreover, Schmidt acknowledges that he received the circuit court’s January 12, 2016 notice stating that the trial would begin on January 19, 2016. The notice plainly required Schmidt to prepare for the eventuality that his case would proceed to trial as scheduled.

¶21 Schmidt further suggests that he reasonably failed to prepare for trial because it was originally scheduled to begin on January 18, 2016, a date on which the courthouse was closed for a state holiday. The transcript of the January 19, 2016 proceeding reflects, however, that Schmidt never mentioned the holiday closure, let alone suggested that he failed to prepare because he was confused by the courthouse schedule. Accordingly, we reject Schmidt’s suggestion that the holiday justified his actions. *See State Farm Mut. Auto. Ins. Co. v. Hunt*, 2014 WI App 115, ¶32, 358 Wis. 2d 379, 856 N.W.2d 633 (“Arguments raised for the first time on appeal are generally deemed forfeited.”) (quoted source omitted). We add that, because this matter was scheduled for a three-and-a-half-day trial starting on January 18, 2016, no party could reasonably be surprised by the obligation to proceed on January 19, 2016.

¶22 A circuit court has “the inherent power to dismiss actions pending before it if they are not being prosecuted in a reasonably timely manner.” *Marshall-Wisconsin Co. v. Juneau Square Corp.*, 139 Wis. 2d 112, 137, 406 N.W.2d 764 (1987) (emphasis omitted). Indeed, circuit courts have a duty to

discourage protraction of litigation “and to refuse their aid to those who negligently or abusively fail to prosecute the actions which they commence.” *See Latham v. Casey & King Corp.*, 23 Wis. 2d 311, 315, 127 N.W.2d 225 (1964) (citation omitted). Here, Schmidt failed to offer a clear and justifiable excuse for failing to prosecute his case on the trial date, and we are satisfied that the circuit court reasonably exercised its broad discretion when the circuit court implicitly determined that Schmidt’s conduct was egregious and dismissed the case.

¶23 We need only briefly note that, in addition to challenging the order of dismissal, Schmidt complains on appeal about allegedly erroneous pretrial rulings, seeks orders from this court related to discovery and mediation, and requests that we impose penalties on Badger Mutual. Because we affirm the order dismissing the case with prejudice, Schmidt’s arguments about other allegedly incorrect circuit court rulings are moot. *See State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425 (holding that “[a]n issue is moot when its resolution will have no practical effect on the underlying controversy”). We may entertain moot questions in exceptional circumstances, *see id.*, but we conclude that further consideration of moot matters here is not warranted. As to Schmidt’s requests for assorted orders and his demand that we penalize Badger Mutual and require it to pay “exemplary damages,” Schmidt’s brief fails to identify a legally cognizable basis for such relief and accordingly, we deny it. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶24 We turn to Badger Mutual’s motion for a declaration that this appeal is frivolous. Whether an appeal is frivolous is a question of law that we resolve using an objective standard. *See Howell v. Denomie*, 2005 WI 81, ¶9, 282 Wis. 2d 130, 698 N.W.2d 621. Under WIS. STAT. RULE 809.25(3)(c)1.-2., this

court may determine that an appeal is frivolous if we conclude that either: (1) the appeal “was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another”; or (2) the appellant “knew, or should have known, that the appeal ... was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.” *See id.* We cannot grant the motion unless we conclude that the entire appeal was frivolous. *See Tennyson v. School Dist.*, 2000 WI App 21, ¶35, 232 Wis. 2d 267, 606 N.W.2d 594.

¶25 Badger Mutual argues that Schmidt has pressed his appeal in bad faith and for the purpose of harassment because he offers arguments and raises claims that are not directed at the question of whether the circuit court properly dismissed his case and that are therefore “unrelated to the issue on appeal.” When parties seek to pursue moot issues and to make arguments that were not first presented to the circuit court, we generally do not view such tactics as manifesting an intent to harass. Rather, as we have done here, we normally invoke our well-established policy of declining to address those issues and arguments. *See Olson*, 233 Wis. 2d 685, ¶3; *State Farm Mut. Auto. Ins.*, 358 Wis. 2d 379, ¶32. Badger Mutual also argues that Schmidt is acting in bad faith because he previously pursued three appeals and sought to remove the case to federal court. The instant proceeding, however, is Schmidt’s appeal of right from a final order of dismissal. *See WIS. STAT. § 808.03.* We cannot conclude that such an appeal raises the specter of bad faith merely because Schmidt pursued appeals from nonfinal orders in the past. *Cf. Schultz v. Sykes*, 2001 WI App 255, ¶14, 248 Wis. 2d 746, 638 N.W.2d 604 (explaining that “bad faith consists of a conscious attempt to affect the outcome of the litigation or a flagrant, knowing disregard of the judicial process”) (citations and two sets of quotation marks omitted).

¶26 Badger Mutual also argues that Schmidt knew or should have known that his contentions on appeal had no arguable basis in law. As we have seen, Schmidt in this appeal offers several reasons that he believes justify his failure to proceed to trial as scheduled. Although we have rejected his contentions, an appeal is not frivolous merely because the appellant does not prevail. *See Baumeister v. Automated Prods., Inc.*, 2004 WI 148, ¶28, 277 Wis. 2d 21, 690 N.W.2d 1.

¶27 Schmidt has proceeded as a *pro se* litigant, and in light of his *pro se* status, we are not persuaded that his decision to appeal the order dismissing his lawsuit was wholly indefensible. We therefore deny Badger Mutual's motion to declare his appeal frivolous. Nonetheless, we acknowledge that his arguments are undeniably weak, and our decision not to declare the appeal frivolous is substantially based on our obligation to resolve doubts about frivolousness in favor of the appellant. *See id.* Accordingly, we observe that continued litigation of this matter, if deemed frivolous, may lead to sanctions in the future.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

